Remarks

In the Office Action of September 21, 2005, the Examiner rejected the claims under 35 U.S.C. § 101 for statutory-type double patenting. The Examiner asserted that the claims of U.S. Patent No. 6,602,520, the parent patent for this divisional application, and the claims of the present divisional application conflict and are "directed to the same invention." This rejection is respectfully traversed. Although claim 10 has been amended, the amendment merely corrects a typographical error (see p. 4, l. 28 of the application for support).

As noted in the preliminary amendment to this case, Examiner Rose, who is now retired, allowed the claims of the parent case, which did not include an effervescent couple in the formulation. Thus, Claim 1 of the '520 patent recites:

> "(a) preparing a combination comprising at least one active pharmaceutical ingredient and at least one excipient . . ."

Claim 10 of the present application recites:

> (a) preparing a combination comprising at least one active pharmaceutical ingredient, *an effervescent couple* and at least one excipient, *other than the components comprising said effervescent couple* . . ." (emphasis added.)

This distinction was insisted upon by the previous Examiner. The addition of the effervescent couple adds a distinct element to the claimed invention that is not required by the issued patent. Indeed, claim 10 emphasizes that neither of the components comprising the effervescent couple can be the excipient. Since the claims are not identical, the rejection should be withdrawn. It is possible to infringe the claims of the parent patent without infringing the claims of this divisional application, which nullifies statutory-type double patenting rejection.

(See MPEP §804 "A reliable test for double patenting under 35 U.S.C § 101 is whether a claim in the application could be literally infringed without literally infringing a corresponding claim in the patent. In re Vogel, 422 F.2d 438, 164 USPQ 619 (CCPA 1970). Is there an embodiment of the invention that falls within the scope of one claim, but not the other? If there is such an embodiment, then identical subject matter is not defined by both claims and statutory double patenting would not exist.")

The Examiner has cited U.S. Patent No. 5,037,657 to Jones et al. ("Jones") as being a reference that shows, "an effervescent acetylsalicylic acid tablet comprising an effervescent couple, and a binder" but that does not have a binder. Even though this citation does not support a formal rejection, applicant notes that Jones is directed to improving the rate of dissolution or disintegration of an effervescent tablet using powdered dextrose and/or sucrose in a direct compression process (col. 4, l. 18-36), not a granulation process as claimed in the present application. Accordingly, Jones is inapposite to the claimed invention.

Withdrawal of the rejection and allowance of the claims is respectfully solicited.

Respectfully Submitted,

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